

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



77-1435

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

LAVANNE ELAINE HAMMOND and  
MILLCENT JONES,

Appellants.  
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To be argued by  
Richard E. Rieder

Docket No. 77-1435

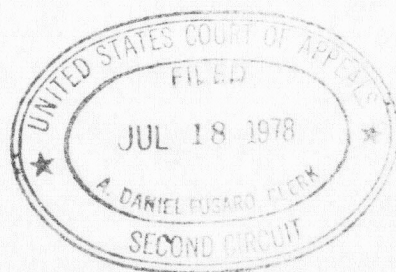
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REPLY BRIEF FOR APPELLANT LAVANNE ELAINE HAMMOND

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS  
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| Appellants.                | : |                    |

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REPLY BRIEF FOR APPELLANT LAVANNE ELAINE HAMMOND

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ON APPEAL FROM A JUDGMENT  
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PRELIMINARY STATEMENT

This brief is submitted in reply to the brief of the United States filed herein. The government argues that this court should create a third party warrant exception to the interpretation of the Fourth Amendment set forth in United States v. Reed, Dkt. No. 77-1319, Slip Op. 2395 (2d Cir. April 11, 1978). Appellant asserts that no such exception should be created. The government relies



upon one case United States v. Harpur, 550 F.2d 610 (10th Cir. 1977). That case was noted by the court in Reed but it was not relied upon or followed. Other authority, United States v. McKinney, 379 F.2d 259 (6th Cir. 1967) supports appellants position and is in consonance with the recent precedent established by the Supreme Court in Mincey v. Arizona No. 77-5353, Decided June 21, 1978.

ARGUMENT

A THIRD PARTY WARRANT EXCEPTION  
TO THE FOURTH AMENDMENT SHOULD  
NOT BE CREATED

The government argues that since the agents of the Drug Enforcement Agency had a warrant to arrest the fugitive Basil Hansen, who they believed to be in appellant Hammond's house, they had the right to enter Hammond's home. Once there Hammond's "reasonable expectation of privacy" was dissipated and the agents could do whatever they could do in a "public street or public place." They could arrest Hammond without a warrant and search her pocketbook incident to that arrest. The government asserts that United States v. Reed, Dkt. No. 77-1319 Slip Op., 2395 (2d Cir., April 11, 1978) supports this position and "completely undermines" the contrary position taken by appellant Hammond (Gr. Br.\* 13).

This argument is without support in this circuit. Reed holds warrantless felony arrests by federal agents in the suspects home without exigent circumstances to be unconstitutional (United States v. Reed, Slip Op., at 2404). As the government does not

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\*"Gr.Br." refers to the Brief for the United States of America submitted in this appeal.



assert that there were "exigent circumstances" present here, it appears to argue that there should be a third party warrant exception to the holding in Reed. The government cites United States v. Harpur, 550 F.2d 610 (10th Cir.) in support of its position. It is inadequate precedent. The holding in Harpur was specifically acknowledged in Reed (Slip Op. 2410 fn.) as not lending support to that decision and presumably disregarded. The reasoning supporting the decision in Harpur, has also recently been rejected by the Supreme Court in Mincey v. Arizona No. 77-5353, Slip Opinion, decided June 21, 1978.

The government further argues that to require the agents once in Hammond's house to leave to obtain a warrant for her arrest would amount to an "elevation of form over substance" and might result in Basil Hansen being warned that the "agents were on his trail" (Gr. Br. 15 fn.). The government's argument that an arrest warrant is simply a matter of form has no legal support. A similar assertion was recently rejected by the Supreme Court in Mincey, Slip Opinion at page 7:

"The investigation of crime would always be simplified if warrants were unnecessary. But, the Fourth Amendment reflects the view of those who wrote the Bill of Rights

that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."

The argument may also have no factual support. The government appears to assume that the DEA agents would have to leave Hammond's home to obtain an arrest or search warrant. But would they? Presumably they could have remained there for a reasonable time to determine if the fugitive Hansen would return. And in that time they could have sought an arrest or search warrant with respect to Hammond.

The government's argument that the DEA agents had to arrest Hammond in order to prevent her from warning Hansen is also unpersuasive. He was evidently already warned as he was gone from the house. But this is simply an exigent circumstance argument for which the precedent is inoposit. It is strikingly similar to the argument made in United States v. Calhoun 542 F.2d 1094 (9th Cir. 1976 en banc) at 1102:

"Both sides apparently agree that absent exigent circumstances, the entry would be illegal. The government contends that once they had raided Calhoun's apartment there was the distinct possibility that other conspirators would hear of the raid and attempt to flee. Fear that a suspect will escape is an exigent circumstance. United States v. Curran, 498 F.2d 30, 35-36 (9th Cir. 1974).



But if it is created by the law enforcement officers, it will not support a warrantless search. Curran, supra, at 34. Davis v. United States, 327 F.2d 301, 306 (9th Cir. 1964)."

Moreover in concluding its argument the government appears to concede that exigent circumstances were not present in this case. "The presence of exigent circumstances, however, is one of a number of exceptions to the warrant requirement justifying warrantless intrusions (citation omitted), and is not required for lawful intrusions based upon an arrest warrant." (Gr. Br. 18, 19). Indeed, in making that concession the government appears to ignore the holding in Reed that exigent circumstances are the only exception to the requirement for a warrant in order to make an arrest of a person in his home.

Appellant Hammond's arrest being unconstitutional, the search conducted of her pocketbook incident to it was unconstitutional and the evidence seized should not have been admitted in evidence.

With regard to the seized drug paraphernalia the government again relies upon the decision in Harpur, supra, supported by the "plain view" doctrine, United States v. Berenguer, 562 F.2d 206, 210 (2d Cir. 1977). It argues that Harpur provides authority for the agents to enter Hammond's house and seize evidence in plain view. And under Berenguer the drug paraphernalia was in plain view.

Again it has ignored the tacit rejection of the holding in Harpur by the Reed court. Harpur is also distinguishable from this case. In Harpur only evidence in the immediate possession of the resident was seized incident to his arrest. The remaining evidence, also drug paraphernalia, was seized pursuant to a search warrant which the police immediately obtained after arresting Harpur. Here the police had a similar opportunity after arresting Hammond. They did not, however, take advantage of it.

The government also has disregarded the language in United States v. McKinney, 379 F.2d 259 263 (6th Cir. 1967) to the effect that the only evidence that can be seized and introduced pursuant to an arrest warrant for a third party is that evidence in his "immediate control." There was no such evidence in this case as the third party, Hansen, was not found.

The position taken by the court in McKinney is an important corollary to the holding in Reed. Reed prohibits the invasion of privacy accompanying a warrantless arrest. McKinney supports that limitation by restricting the evidence that can be seized pursuant to a warrant for a third party to that in the third party's control. Taken together they hold that when the police have a third party warrant they are limited, absent well



defined exigent circumstances, to seizing what they are looking for, the third party. If that were not the rule a person might be subjected to a detailed search by the police seeking a third party who may have been an intruder in his home. This would necessitate the drawing of fine distinctions between invitees and trespassers, distinctions which the police would be unable to make prior to arrest.

In summary, to hold the seized evidence admissible against Hammond would require the adoption of a third party warrant exception to the holding in Reed. A similar attempt to add a "homicide scene" exception to the search warrant requirement set forth in Katz v. United States, 389 U.S. 347 (1967) was recently rejected by the Supreme Court in Mincey, supra. One of the arguments in favor of the exception raised in that case (Slip Opinion p. 5), that the authorized invasion to perform an arrest renders the additional intrusion of the search irrelevant - is identical to that raised by the government here. It was rejected in that case and should be in this.

CONCLUSION

For the above-stated reasons, Appellant Hammond's conviction should be reversed and a new trial ordered.

Respectfully submitted,

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